NEW SELANGOR PLANTATIONS SDN. BHD.

v.

TALAM MANAGEMENT SERVICES SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
DATO' LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-507-1995]
24 MAY 1995

CONTRACT: *Acceptance - Nature of - Whether must be absolute and unqualified acceptance of offer - Whether offer lapsed - Whether vendor entitled to withdraw from sale & purchase agreement*

CONTRACT: *Sale & purchase of land - 'Subject to contract' - Offer - Counter-offer - Letter confirming purchase price - Draft sale & purchase agreement - Amendments to draft - Whether there was unqualified acceptance of offer - Whether a valid and binding agreement formed*

CONTRACT: *Formation - Terms - 'Subject to contract' - "Such terms and conditions as shall be determined or advised by our solicitors in transactions of this nature" - Whether sufficiently certain to form binding contract - Agreement on purchase price - Whether sufficient*

LAND LAW: *Sale of land - 'Subject to contract' - Whether contract formed*

LAND LAW: *Caveats - National Land Code 1965, s. 323(1)(a) - Whether defendant has registrable interest - Whether defendant has right to enter and maintain private caveats*

By a letter dated 15 March 1995, the defendant had offered to purchase the plaintiff's lands ('the land') at RM34,000 per acre, the price to be paid within three years from the date of the sale & purchase agreement. This was rejected by the plaintiff. On 23 March 1995, both the parties met and the defendant increased its offer to RM35,000 per acre. The plaintiff accepted the increase and confirmed the same by a letter dated 27 March 1995 ('the said letter') which, amongst other salient terms, provided for "such terms and conditions as shall be determined or advised by our solicitors in transactions of this nature."

On 31 March 1995, the plaintiff's solicitors forwarded a draft sale & purchase agreement incorporating the basic terms agreed upon in the said letter. The defendant's solicitors responded with a letter dated 11 April 1995 making various amendments, variations, counter-proposals, alterations, additions, and deletions to the said draft.

The changes made were not acceptable to the plaintiff and disputes arose leading to the defendant lodging several private caveats against the land. The plaintiff subsequently initiated the instant proceedings praying for, inter alia, a declaration that there was no concluded contract for the sale of the land, and for an order that all the private caveats entered by the defendant against the land be removed. On the other hand, the defendant contended that the said letter and the draft agreement constituted the entire contract between both parties.

Held:

[1] Upon a true construction of the letter from the defendant dated 11 April 1995, the Court held that it did not constitute an absolute or unqualified acceptance of the terms and conditions offered by the plaintiff in the draft sale & purchase agreement. An acceptance must be absolute and unqualified. That being the case, the offer had lapsed and the plaintiff was entitled to withdraw from the said sale, which it did.

[2] The term, "... such terms and conditions as shall be determined or advised by our solicitors in transactions of this nature," as found in the said letter was so uncertain that it prevented the formation of a binding contract between the parties.

[3] On the facts, the parties had clearly not reached any *consensus ad idem* on the terms and conditions pertaining to the sale and purchase of the land. The agreement on the price of RM35,000 per acre by itself was insufficient to form any binding contract. There must be an agreement on the other essential terms.

[4] In the instant case, the defendant's counter-proposals in the form of variations, alterations, deletions, additions, and amendments, were not accepted by the plaintiff. The defendant's counter-proposals were a far cry from an unqualified acceptance of the plaintiff's offer to sell the said land. The essential terms had not been agreed upon. Hence, the parties had not come to a final and complete agreement. At most, they were in the process of negotiations, from which either party might retract. There was, therefore, no concluded contract.

[5] The instant case was one of those which fell into the category of 'subject to contract' cases. Both parties contemplated the signing of a formal sale & purchase agreement to properly document the contract between them. Applying the objective test of a reasonable man, it is only reasonable to expect the parties to enter into a proper and comprehensive sale & purchase agreement documenting all the terms and conditions agreed upon between the parties before a valid and binding contract is in existence between the parties.

[Plaintiff's application allowed; order accordingly]

Cases referred to:

Ee & Lim Advocates v. Gin Nan Development Corporation Sdn. Bhd. & Anor. [1992] 3 CLJ 1575 ***(cit)***

Summergreene v. Parker [1950] 80 CLR 304 ***(refd)***

Crossley v. Maycock [1874] 18 LR Eq. 180 ***(refd)***

Masters and Anor v. Cameron [1954-1955] 91 CLR 353 ***(refd)***

Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon [1994] 1 CLJ 1 ***(refd)***

Clifton v. Palumbo [1944] 2 All ER 497 ***(refd)***

Ayer Hitam Tin Dredging Malaysia Berhad v. Y C Chin Enterprises Sdn. Bhd. [1994] 2 MLJ 754 ***(refd)***

Tan Sri Abdul Aziz bin Zain v. Development & Commercial Bank Kuala Lumpur High Court Civil Suit No. S7-22-559-90 [unreported] ***(refd)***

Tan Chee Hoe & Anor v. Ram Jetmal Punjabi [1983] 2 MLJ 31 ***(refd)***

United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd [1968] 1 AER 104 ***(cit)***

Rossiter v. Miller [1877-1878] 3 LR App. 1124 HL. ***(cit)***

Barrier Wharfs Ltd. v. W. Scott Fell & Co. Ltd. [1908] 5 CLR 647 ***(cit)***

MN Guha Majumdar v. RE Donough [1974] 2 MLJ 114 ***(cit)***

Legislation referred to:

National Land Code, 1965, ss. 323(1)(a), 327

Contracts Act, 1950, s. 5(1), 7

Other sources referred to:

Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 75

For the plaintiff - Manjeet Singh; M/s. Sri Ram & Co.

For the defendant - C.K. Yeoh; M/s. Iza Ng & Yeoh

JUDGMENT

Low Hop Bing J:

The Application

The plaintiff's originating summons is an application for the following orders:

(a) a declaration that there is no concluded contract for the sale of the several parcels and pieces of land more particularly described in schedule A to the plaintiff's originating summons ("the said lands") between the plaintiff and the defendant;

(b) an order under s. 327 of the National Land Code, 1965 that all the several private caveats entered by the defendant against the said lands be removed forthwith;

(c) a consequential order for an inquiry into the damages sustained by the plaintiff as a result of the defendant's caveats to be assessed by the Court; and

(d) costs.

Sole Issue

The sole issue to be determined by the Court in this application is whether the defendant has a registrable interest under s. 323(1)(a) of the National Land Code 1965 to enable the defendant to continue with the caveats entered by it in respect of the said lands. In other words, was there a concluded contract between the plaintiff and the defendant in respect of the said lands?

The burden is on the defendant to show that it has a registrable interest e.g. by way of a concluded contract for the purchase of the said lands.

The Defendant's Case

Initially, the defendant contended in para. 11 of its 1st affidavit that the terms incorporated in the plaintiff's letter dated 27 March 95 (Exh. P3) annexed to the plaintiff's 1st affidavit forms the basis of a valid and binding agreement between the plaintiff and the defendant in respect of the said lands.

Subsequently, in para. 17 of the defendant's 1st affidavit, the defendant altered its original stance and now contended that Exh. P3 together with Exh. P4 (the draft sale and purchase agreement annexed to the plaintiff's 1st affidavit) constitutes the entire contract between the plaintiff and the defendant.

The defendant grounded its caveats purportedly on a concluded contract between the parties hereto. The defendant has filed a separate writ in the Shah Alam High Court, Civil Suit No: 22-214-1995 ("the defendant's civil suit"), subsequent to the plaintiff's originating summons, asking for specific performance thereof.

The Plaintiff's Case

The plaintiff contended that on a true and proper construction of the salient documents, namely, plaintiff's letter dated 27 March 1995 (marked as P3 to the plaintiff's 1st affidavit), the draft sale and purchase agreement (marked as P4 to the plaintiff's 1st affidavit) and the defendant's reply by their letter dated 11 April 1995 (marked as P9 to the plaintiffs' 1st affidavit), there is no concluded contract between the parties hereto in respect of the sale and purchase of the said lands.

Finding of Facts

Exhibit P2 is a letter dated 15 March 1995 from the defendant to the plaintiff, offering to purchase the said lands at RM34,000 per acre, to be paid in cash within three years from the date of the sale and purchase agreement. This letter showed that the defendant did contemplate executing a sale and purchase agreement in due course.

Subsequent to the aforesaid letter P2, the parties by their representatives and their respective solicitors met at the office of the plaintiff on 23 March 1995, wherein the plaintiff rejected the defendant's offer to purchase the said lands at RM34,000 per acre. Consequently, the defendant increased its offer to RM35,000 per acre which was accepted by the plaintiff and the plaintiff then informed the defendant of the payment schedule and the conditions precedent which would have to be incorporated into a formal sale and purchase agreement in due course.

The agreement between the parties at the aforesaid meeting is not disputed by either party since the same was confirmed subsequently in the letter from the plaintiff dated 27 March 1995 (P3), pursuant to which the parties agreed to the following:

(a) price - RM35,000 per acre, totalling RM575,785,000;

(b) payment terms:

(i) 10% on signing sale and purchase agreement;

(ii) 15% payable within six months of the sale and purchase agreement or when the same becomes unconditional, whichever is earlier;

(iii) 15% within 12 months of the sale and purchase agreement;

(iv) 30% within 24 months of the sale and purchase agreement;

(v) 30% within 36 months of the sale and purchase agreement.

(c) conditions precedent:

(i) Foreign Investment Committee, (FIC) approval;

(ii) Shareholders' approval.

(d) such terms and conditions as shall be determined or advised by the plaintiff's solicitors.

By reason of the above, it is demonstrably clear that the parties hereto contemplated executing a formal sale and purchase agreement in due course and that the sale and purchase agreement would, *inter alia*, include such terms and conditions as shall be determined or advised by the plaintiff's solicitors in transactions of this nature.

On 31 March 1995, the plaintiff's solicitors forwarded a draft sale and purchase agreement incorporating the terms agreed upon between the parties in P3 and in addition thereto, "such other terms and conditions as determined or advised" by the plaintiff's solicitors, Messrs Sidek Teoh Wong & Dennis. The plaintiff's said solicitors, upon inquiry from the defendant's solicitors, forwarded P6, i.e. letter dated 4 April 1995 and P7, i.e. fax dated 5 April

1995, annexed to the plaintiff's 1st affidavit, setting out the information requested by the defendant.

The defendant's solicitors replied after a couple of reminders, by its letter dated 11 April 1995, i.e. P9 annexed to the plaintiff's 1st affidavit. The said letter (P9) is a response to the plaintiff's draft sale and purchase agreement (P4) by the defendant, through their said solicitors, wherein the defendants made various amendments, variations, counter-proposals, alterations, additions and/or deletions of the essential terms offered by the plaintiff in the said sale and purchase agreement (P4). The defendant did not accept the plaintiff's terms and conditions absolutely or without any qualifications. Instead, the defendant sought to qualify the plaintiff's offer and/or counter-offer by its own terms and conditions for the plaintiff's consideration. Some of these essential terms were as follows:

Clause in the Sale and Purchase Agreement	**Defendant's Proposal**
2	Plaintiff's stakeholders to be changed to defendant's stakeholders.
3.1B	Automatic extension of six months, as opposed to an extension at plaintiff's absolute discretion.
3.2	Imposition of four new conditions precedent.
3.8	Refund of deposit with interest as opposed to refund, without interest.
4 & 17(i)	Schedule for payment of purchase price to be altered from 36 to 42 months.
7	Release of title deed by plaintiff upon the plaintiff receiving a bank guarantee rather than by way of actual payment to the plaintiff.
10(c); 17(ii) and (iii)	In the event of termination of the sale and purchase agreement, the plaintiff to have no recourse from the defendant for all legal and other expenses incurred on a re-transfer.
19(b) and (20)	Defendant is to be entitled to registration of title deed before full payment.

The Law

It was submitted for the plaintiff that Exh. P9 does not constitute an absolute or unqualified acceptance of the terms offered by the plaintiff. The defendant contended that there was a concluded contract.

On a true and proper construction of P9, I hold that it does not constitute an absolute or unqualified acceptance of the terms and conditions offered by the plaintiff in the draft sale and purchase agreement i.e. P4. Section 7 of the Contracts Act, 1950 provides that an acceptance must be absolute and unqualified. Section 7 reads as follows:

> 7. **Acceptance must be absolute**
>
> In order to convert a proposal into a promise the acceptance must -
>
> (a) be absolute and unqualified.

[See also *Ee & Lim Advocates v. Gin Nan Development Corporation Sdn. Bhd. & Anor.* [1992] 3 CLJ 1575, per Haidar J).

The facts as alluded to above clearly show that the defendant's acceptance of the plaintiff's offer in P3 and P4 is not absolute and unqualified, and hence there has been no acceptance in law of the plaintiff's offer. That being the case, the offer lapses and the plaintiff is entitled to withdraw from the said sale and purchase as it did *vide* its letter dated 2 May 1995, marked as P11 to the plaintiff's 1st affidavit'. Section 5(1) of the Contracts Act, 1950 provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards. In the result, I hold that there is no concluded contract between the parties hereto.

Further, the term in P3 which provides that the sale is subject to "such terms and conditions as shall be determined or advised by our solicitors in transactions of this nature" is void for uncertainty, under s. 30 of the Contracts Act 1950 which reads as follows:

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.

In *Summergreene v. Parker* [1950] 80 CLR 304, clause 6 of the offer stated that "The usual agreement for sale and purchase to be entered into by you and the company containing the usual terms of sale and these terms in a form satisfactory to you and to the company." The Court held that this clause was so uncertain in its terms as to prevent the arrangement amounting to a binding contract. Accordingly there was no contract between the parties.

In *Crossley v. Maycock* [1874] 18 LR Eq. 180 the Court held:

> if the agreement is made subject to certain conditions then specified or to be specified by the party making it or by his solicitor, then **until those conditions are accepted there is no final agreement such that the Court will enforce.**

In the instant case before me, the parties have not reached any *consensus ad idem* on the terms and conditions pertaining to the sale and purchase of the said lands, in order to create any legally binding-contract between the parties.

In *Masters and Anor v. Cameron* [1954-1955] 91 CLR 353, the Court held that where the respondent in a document agreed to sell a certain farming property to the appellant "subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions" and the appellant accepted the said terms and conditions, the document did not constitute a binding contract between the respondent and the appellant.

In *Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 CLJ 1 the Supreme Court held that the *proviso* to condition No. 3 in the document, to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other "usual terms and conditions". The term "usual terms and conditions" remained largely a matter of conjecture and would create uncertainty unless a contract containing these agreed "usual terms and conditions" had been signed by the parties. In the result, the Court further held that there was no contract at all and the words "usual terms and conditions" were uncertain and too ambiguous to evince a definite meaning on which the Court could safely act.

The relevant exhs. P3, P4 and P9 would indicate that only the price at RM35,000 per acre has been agreed. That alone is not sufficient. In *Clifton v. Palumbo* [1944] 2 All ER 497, the Court held that in transactions relating to land, the first thing to begin to think about is the price, because it is useless going further if the price is not agreed upon, and that the agreement on price forms the basis to negotiate the rest of the terms. Agreement on the price itself is insufficient. There must be agreement on other essential terms.

Since the total purchase price is well above RM575,000,000, the parties are reasonably expected to enter into a definite sale and purchase agreement setting out various terms and conditions positively and clearly and to be properly documented. In *Ayer Hitam Tin Dredging Malaysia Berhad v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 2 MLJ 754, the Supreme Court observed that "in the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14 million would be properly documented.

In *Tan Sri Abdul Aziz bin Zain v. Development & Commercial Bank Kuala Lumpur* High Court Civil Suit No. S7-22-559-90 (unreported), where the purchase RM35,000,000, Rahmah Hussain JC (as she then was) said:

> To my mind, in a sale of this magnitude, it is never the contemplation of the parties to conclude it, unless all other important terms have been agreed.

In the instant case, the defendant's counter proposal to alter the stakeholders to be the defendant's solicitors in place of the plaintiff's solicitors amounted to an introduction of a fresh term which was not accepted by the plaintiffs. In *Tan Chee Hoe & Anor. v. Ram Jethmal Punjabi* [1983] 2 MLJ 31, the Singapore High Court held that addition of the words "who will hold the same as stakeholders" introduced a fresh term by the applicants, the grantees of the option. It was a material variation of the offer and it amounted to a counter-offer on the part of the applicants which was not accepted by the respondents.

Lord Denning MR in *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.* [1968] 1 AER 104, 107, said that in order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer.

Volume 8 *Halsbury's Laws of England*, 3rd Edn. p. 75 reads as follows:

> In order to constitute acceptance, the assent to the terms of an offer must be absolute and unqualified ... If the acceptance is conditional or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter offer, which in turn requires to be accepted by the person who made the original offer.

In the instant case, the defendant's counter-proposals in the form of variations, alterations, deletions, additions or amendments, have not been accepted by the plaintiff. The defendant's counter-proposals are a far cry from an unqualified acceptance of the plaintiff's offer to sell the said lands. The essential terms have not been agreed upon. Hence, the parties had not come to a final and complete agreement. At most, they were in the process of negotiation, in which either party may retract. Numerous essential particulars still remain unsettled. There was no concluded contract.

In *Rossiter v. Miller* [1877-1878] 3 LR App. 1124 HL. at p. 1151 Lord Blackburn said:

> ... It is a necessary part of the plaintiff's case to shew that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation, either may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract.

In *Barrier Wharfs Ltd. v. W Scott Fell & Co. Ltd.* [1908] 5 CLR 647 the High Court of Australia held as follows:

(a) even if principal terms are agreed upon, there is no contract if other essential terms are not agreed upon (at p. 666);

(b) that at best there was only a provisional agreement before a concluded contract could come into existence (pp. 668 and 669);

(c) where there are other terms to be agreed upon or some new terms inconsistent with those agreed upon and fresh terms, at best it can be said that there was no finality reached between the parties (at p. 670).

No deposit has yet been paid by the defendant to the plaintiff. The clear and undisputed facts of this case can lead to one and only one conclusion i.e. this case is one of those cases which fall into the category of "subject to contract" cases.

When an arrangement is made "subject to contract" or "subject to the preparation and approval of a formal contract" it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. In the instant case, P2 contemplates the signing of a sale and purchase agreement by the defendant; P3 expressly states that the plaintiff's solicitors will prepare the agreement for the defendant's consideration which is P4, and P9 sets out the comments and counter-proposals of the defendant's comments which have been referred to the plaintiff for its consideration. Lastly, P11 says that the changes proposed by the defendant in P9 are not acceptable to the plaintiffs. From the foregoing, only one reasonable conclusion can be drawn i.e. both the parties contemplated the signing of a formal sale and purchase agreement to properly document the contract between them. Applying the objective test of a reasonable man, propounded by the Supreme Court in the *Ayer Hitam Tin Dredging Malaysia Bhd* case, *supra*, it is only reasonable to expect the parties to enter into a proper and comprehensive sale and purchase agreement documenting all the terms and conditions agreed upon between the parties before a valid and binding contract is in existence between the parties.

BTH Lee J (as he then was) in *M.N. Guha Majumdar v. RE Donough* [1974] 2 MLJ 114, 116-H-I right hand column said:

> It is a well established rule that the parties must make their own contract and this means they must agree to its terms with sufficient certainty. If the terms are unsettled or indefinite there will be no contract.

In the light of the above analysis, I have no hesitation in holding that there is no concluded contract between the parties. In the circumstances, it must necessarily follow that the defendant has no caveatable interest to maintain the caveats. Hence, I order that the defendant's caveats be removed forthwith with costs, and an inquiry as to damages be held.

Reported by Isaac TJ Lee